COURT OF APPEALS
DECISION
DATED AND FILED

September 3, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1963 **Cir. Ct. No. 2006CV73**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

LINDA ESPITIA,

PLAINTIFF-APPELLANT,

V.

GORDON FOUCHE,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Washington County: ANNETTE K. ZIEGLER, Judge. *Affirmed*.

Before Brown, C.J., Anderson, P.J., and Snyder, J.

¶1 PER CURIAM. Linda Espitia appeals a money judgment of $12,129.57 entered in her favor and against Gordon Fouche, her former fiancé. Espitia contends that Fouche's admitted default on the parties' mediated

agreement entitles her to $25,000 in liquidated damages. We agree with the trial court's analysis and affirm.

¶2 During their relationship, Espitia and Fouche jointly assumed debt and bought a Harley-Davidson motorcycle. In November 2005, they entered into a Disassociation Agreement and Promissory Note. Espitia commenced this action when Fouche allegedly breached the terms of the agreement. In September 2006, they entered into a mediated stipulation that replaced the earlier agreement. Two months later, the trial court entered an Order for Dismissal, more formally reciting the provisions of the handwritten stipulation.[1]

[1] The November 2006 Order for Dismissal, reciting the parties' agreement, provides:

> 1. [Fouche] shall pay to [Espitia] $12,834.00 by making payments of $500.00 per [month] which shall commence on October 21, 2006 and continue thereafter on the 21st day of each month until this total is paid in full.
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> 2. [Fouche] shall timely make the monthly payment on the subject Harley[-]Davidson Motorcycle which is due on or about the 21st of each month commencing on October 21, 2006, and [Fouche] shall continue making the monthly payments thereafter on the 21st day of each month until the Harley[-]Davidson loan balance is paid in full.
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> 3. [Fouche] shall pay [Espitia] by April 21, 2007 the Harley[-]Davidson motorcycle insurance premium to become due for the annual period commencing on or about May 19, 2007. [Fouche] is to sign a release allowing Harley[-]Davidson or any of its sub-parts to provide payment information directly to [Espitia], and if Harley[-]Davidson refuses to honor such a release, then [Fouche] shall provide proof of payment to [Espitia] within 5 days of the date of payment. [Fouche] agrees to keep Harley[-]Davidson registration current at all times and he agrees to be liable for all parking or other violations.

(continued)

¶3 Under its terms, Fouche agreed to pay insurance on the Harley and to make two streams of payments: $500 a month to Espitia toward a $12,834 debt and $244 a month to Harley-Davidson toward the $10,782 remaining on the motorcycle loan until the amounts were paid in full. Espitia would keep the Harley but surrender it to Fouche upon timely payment of the insurance and both payments for seven consecutive months. For some reason, she gave him the motorcycle earlier. Espitia reclaimed it after Fouche defaulted in February 2007.

> 4. [Espitia] shall retain possession of the Harley[-]Davidson motorcycle. If [Fouche] makes the payments due under Sections 1 and 2 above for seven consecutive months commencing with the October 21, 2006 payment and pays the insurance premium of Section 3 above by April 21, 2007, [Espitia] shall allow [Fouche] to pick up motorcycle forthwith. If [Fouche] defaults in either payment to [Espitia] any time thereafter by 10 days, [Fouche] shall deliver possession of motorcycle to [Espitia] forthwith. If [Fouche] fails to deliver possession, [Espitia] may obtain a replevin judgment from the court without notice and [Fouche] shall be liable for all costs of the replevin and pickup, including reasonable attorney fees.
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> 5. Upon completion of all payments due hereunder, [Fouche] shall receive possession of the ring and the Weber grill[] and shall sign over title for the Harley[-]Davidson motorcycle to [Fouche].
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> 6. If [Fouche] defaults in any payment due hereunder, [Espitia] shall automatically be entitled to a judgment in the amount of $25,000.00 plus statutory costs and disbursements, but reduced by any payments made to [Espitia] under Section 2. This is in addition to the replevin judgment authorized by Section 4. Upon voluntary return of possession of Harley[-]Davidson motorcycle or upon return of same by replevin judgment, [Fouche] agrees that [Espitia] may sell the Harley[-]Davidson motorcycle forthwith at a price determined by her and she may apply the proceeds against the Harley[-]Davidson loan balance. Any excess of proceeds shall be applied to payments due under Section 2.

¶4 In March 2007, Espitia moved to reopen and for a default judgment and a money judgment of $25,000 plus costs and disbursements, reduced by the Harley payments Fouche had made. Trial was to the court. Fouche appeared pro se. Espitia testified that she sold the motorcycle for $10,129.83, the balance due. At the conclusion, the trial court found that conflicting terms in the parties' agreement made it "difficult to construe logically." Using the $25,000 as a starting point, the court determined the money judgment as follows:

$25,000.00		
-	2,000.00	(4 x $500 debt payments)
-	10,129.83	(sale of Harley)
-	1,220.00	(5 x $244 Harley payments)[2]
-	243.48	(1 x $243.48 Harley payment)
$11,406.69		(judgment)
+	722.88	(costs)
$12,129.57		**(total judgment)**

¶5 Espitia appeals.[3]

[2] The parties dispute whether Fouche made five or six payments to Harley-Davidson. Fouche proved five at trial. In the body of its written decision, the court states that he deserves credit for six payments, but its calculation factors in a credit for five. On appeal, Espitia concedes six. We will leave it at five, the number proved.

[3] Fouche, again pro se, did not file a brief. Although we may summarily dismiss the appeal if we conclude his failure to file a brief means he has abandoned the appeal or is acting egregiously or in bad faith, we opt not to. *See* ***Daniels v. Wisconsin Chiropractic Examining Bd.***, 2008 WI App 59, ¶3 n.3, ___ Wis. 2d ___, 750 N.W.2d 951.

¶6 On appeal, Espitia contends that Fouche's default entitled her to $25,000 in liquidated damages because the agreement unambiguously provides a set-off only for payments made on the Harley.[4] The construction of a written contract is a question of law that we review de novo. ***Frisch v. Henrichs***, 2007 WI 102, ¶30, 304 Wis. 2d 1, 736 N.W.2d 85. Where contract terms are plain and unambiguous, we construe them as they stand. ***Borchardt v. Wilk***, 156 Wis. 2d 420, 427, 456 N.W.2d 653 (Ct. App. 1990). Contract terms that are reasonably or fairly susceptible of more than one construction render a contract ambiguous. ***Id.*** Parol evidence is admissible to discern its meaning. *See* ***Farm Credit Servs. v. Wysocki***, 2001 WI 51, ¶12, 243 Wis. 2d 305, 627 N.W.2d 444. Construing an ambiguous document is a question of fact. ***Insurance Co. of N. Am. v. DEC Int'l, Inc.***, 220 Wis. 2d 840, 847, 586 N.W.2d 691 (Ct. App. 1998). We will uphold the trial court's findings as to its meaning unless clearly erroneous. ***Id.***

¶7 The trial court found that the agreement is ambiguous in several respects. Section 2 directs Fouche to make timely payments to Harley-Davidson "on or about the 21st of each month." Fouche paid by checks dated before the 21st, some of which Harley-Davidson posted after the 21st but assessed no late fees. We cannot agree with Espitia that "payment … on or about the 21st" means cash or its equivalent "**on or ahead of time**" when, as the trial court noted, the agreement neither defines method of payment nor clarifies "on or about."

¶8 Section 6, the damages provision, poses other problems. It states:

[4] Espitia's "strict construction" argument is intriguing given that the parties themselves deviated from the agreement when Espitia gave Fouche the Harley without his having made both streams of payments for seven consecutive months. Therefore, we hesitate to say it was error for the trial court to look at the equities and determine the actual damages.

> 6. If [Fouche] defaults in any payment due hereunder, [Espitia] shall automatically be entitled to a judgment in the amount of $25,000.00 plus statutory costs and disbursements, but reduced by any payments made to [Espitia] under Section 2. This is in addition to the replevin judgment authorized by Section 4. Upon voluntary return of possession of Harley[-]Davidson motorcycle or upon return of same by replevin judgment, [Fouche] agrees that [Espitia] may sell the Harley[-]Davidson motorcycle forthwith at a price determined by her and she may apply the proceeds against the Harley[-]Davidson loan balance. Any excess of proceeds shall be applied to payments due under Section 2.

¶9 Facially plain, it becomes "difficult to logically construe" when read together with the other sections it references. It provides, for instance, that the $25,000 money judgment is to be "reduced by any payments made to [Espitia] under Section 2." Section 2 addresses the Harley debt. Those payments were made directly to Harley-Davidson, however, not to Espitia. Adding to the confusion, the last two sentences permit Espitia to sell the motorcycle and then to "apply the proceeds against the Harley[-]Davidson loan balance. Any excess of proceeds shall be applied to payments due under Section 2." This makes no sense at all. The Harley loan balance *is* Section 2. If the proceeds already are applied against that balance, then like the trial court we, too, are at a loss to explain why excess proceeds "shall be applied" again.

¶10 The court reasonably concluded that the agreement meant to say that any excess monies from the sale of the Harley would work as credits against the $12,894 loan amount addressed by Section 1. The court further concluded that Fouche deserved credit for the Harley payments he made and for the $10,129.83 sale amount. We agree with the trial court's conclusion that, since $25,000 was the approximate sum Fouche owed on the money debt and the Harley debt, the apparent intent of the agreement was to give credit for all payments made.

¶11 Espitia urges us to consider the damages provision as a liquidated damages clause. The validity of a stipulated damages clause presents a mixed question of law and fact. *See* ***Wassenaar v. Panos***, 111 Wis. 2d 518, 524-25, 331 N.W.2d 357 (1983). On review, we will uphold the underlying factual determinations unless they are clearly erroneous. *See* ***id.*** at 525; ***Wisconsin Auto Title Loans, Inc. v. Jones***, 2006 WI 53, ¶25, 290 Wis. 2d 514, 714 N.W.2d 155. The legal conclusion we review independently. ***Wassenaar***, 111 Wis. 2d at 525.

¶12 The overall single test of validity is whether the liquidated damages clause is reasonable under the totality of circumstances, determined by examining (1) whether the parties intended to provide for damages or for a penalty; (2) the difficulty of accurately estimating the damages at the time of contract; and (3) if the amount stipulated is a reasonable forecast of the harm caused by the breach. ***Id.*** at 526, 529-30. Espitia asserts that the $25,000 amount is reasonable.

¶13 As to the first factor, she contends there is no basis to conclude that the amount was intended to punish either party. She also insists, however, that built into the agreement was a strong incentive for Fouche to make full, timely payments: "[It] means just what it says—pay and pay on time, because if you don't keep your word this time, you are going to pay more than your incentive amount under the agreement if you keep it." Although not conclusive, we can infer that at least Espitia intended the $25,000 to be punitive. *See* ***Equity Enters., Inc. v. Milosch***, 2001 WI App 186, ¶22, 247 Wis. 2d 172, 633 N.W.2d 662.

¶14 On the second factor, the greater the difficulty of estimating or proving damages, the more likely the stipulated damages will seem reasonable. ***Wassenaar***, 111 Wis. 2d at 530-31. Espitia contends the $25,000 is reasonable because there is "no way to accurately estimate" aspects of her damages, such as

legal fees associated with enforcement of the agreement.[5] We disagree. We are not persuaded that the "wide range of rates charged by practitioners" comes into play, when Espitia has had the same counsel throughout this matter. More importantly, the monthly payments and total amounts owed are known and certain. Damages can be estimated with relative accuracy, as the trial court demonstrated.

¶15 The third factor, the reasonableness of the parties' forecast of damages, takes into consideration facts available at trial. *See* ***id.*** at 531-32. If the damages provided for in the contract are grossly disproportionate to the actual harm sustained, courts usually conclude that the parties' original expectations were unreasonable. ***Id.*** at 532. Espitia testified that $25,000 "falls pretty close to what [Fouche] owes me." Therefore, the full amount was a reasonable forecast of the actual damages only if Fouche never made a single payment, which is not the case. The damages clause fails all three ***Wassanaar*** factors.

¶16 Finally, Espitia contends that the trial court wrongly reformed the agreement when the equities favor enforcing it. We disagree that the court reformed it. Rather, as we have said, the court construed the ambiguities that

[5] Counsel for Espitia cites to an unpublished case assertedly upholding a stipulated damages clause due to the difficulty of ascertaining "the exact amount of income certain vending machines would produce." The cite provided is "***Buellesbach v. Roob***, 2005 AP 160 (Ct. App. Dist. I)." ***Buellesbach*** indeed is unpublished but it has nothing to do with liquidated damage clauses or vending machines; it is a misrepresentation case brought by newlyweds against a wedding photographer. Also, "2005 AP 160" is the docket number, which we discovered only after reaching a dead end at 2005 WI App 160. At last we located the unpublished case that addresses the subject matter for which counsel cited ***Buellesbach***: ***Stansfield Vending, Inc. v. Osseo Truck Travel Plaza, LLC***, 2003 WI App 201, 267 Wis. 2d 280, 670 N.W.2d 558. Different name, different citation, different district (District IV) but, as promised, unpublished. It is a violation of WIS. STAT. RULE 809.19(1)(e) to provide citations which do not conform to the Uniform System of Citation and of WIS. STAT. RULE 809.23(3) to cite to unpublished opinions. One reason may be that they can be time-consuming to locate. A $100 penalty is imposed against Espitia's counsel. *See* ***Hagen v. Gulrud***, 151 Wis. 2d 1, 8, 442 N.W.2d 570 (Ct. App. 1989).

hampered enforcement. Had the court granted equitable relief, however, it would have been within its sound discretion. *See* ***Hall v. Liebovich Living Trust***, 2007 WI App 112, ¶10, 300 Wis. 2d 725, 731 N.W.2d 649. We have explained the trial court's ruling and its underpinnings. The decision represents an examination of the relevant facts of record, an application of the correct legal standard and a conclusion that a reasonable judge could reach. *See* ***id.***

¶17 For violating WIS. STAT. RULE 809.23(3), Espitia's counsel shall pay the $100 penalty to the clerk of this court within thirty days of the release of this opinion.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.